Supreme Court, U.S.
FILED
OCT 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-215

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM HOHRI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
BARBARA L. HERWIG
JAY S. BYBEE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

30 pp

QUESTIONS PRESENTED

1. Whether Takings Clause claims brought by Japanese-Americans and resident Japanese aliens for losses incurred during World War II are barred by the six-year statute of limitations (28 U.S.C. 2401).

2. Whether petitioners' claims for damages against the United States under the Ex Post Facto, Habeas Corpus, and Privileges and Immunities Clauses and the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Thirteenth Amendments are barred by sovereign immunity.

3. Whether a fiduciary duty exists between petitioners and the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Army & Air Force Exchange Service v. *Sheehan*, 456 U.S. 728 (1982) 18
Block v. *North Dakota*, 461 U.S. 273 (1983) 7
Bruce v. *United States*, 621 F.2d 914 (8th Cir. 1980) 18
Casias v. *United States*, 532 F.2d 1339 (10th Cir. 1976) ... 21
Clark v. *Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984) 19
Clemente v. *United States*, 766 F.2d 1358 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986) 19
Duarte v. *United States*, 532 F.2d 850 (2d Cir. 1976) 19
Eastport S.S. Corp. v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967) 18
Erxleben v. *United States*, 668 F.2d 268 (7th Cir. 1981) ... 18
Hedges v. *Dixon County*, 150 U.S. 182 (1893) 20
Hirabayashi v. *United States*:
320 U.S. 81 (1943) 2, 11, 12, 13
828 F.2d 591 (9th Cir. 1987) 16, 17
INS v. *Pangilinan*, No. 86-1992 (June 17, 1988) 20
Jaffee v. *United States*:
592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979) 19
663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982) 19
Jalil v. *Campbell*, 590 F.2d 1120 (D.C. Cir. 1978) 19
Japanese War Notes Claimants Association v. *United States*, 373 F.2d 356 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967) 15

Cases—Continued: Page

Korematsu v. *United States*:
323 U.S. 214 (1944) 2, 8, 11, 12, 13
584 F. Supp. 1406 (N.D. Cal. 1984) 16
Library of Congress v. *Shaw*, 478 U.S. 310 (1986) 17
Mann v. *United States*, 399 F.2d 672 (9th Cir. 1968) 21
Odin v. *United States*, 656 F.2d 798 (D.C. Cir. 1981) 18
Radin v. *United States*, 699 F.2d 681 (4th Cir. 1983) 19
Schuler v. *United States*, 628 F.2d 199 (D.C. Cir. 1980) .. 18
Smith v. *United States*, 588 F.2d 1209 (8th Cir. 1978) 21
Soriano v. *United States*, 352 U.S. 270 (1957) 7
United States v. *Caltex, Inc.*, 344 U.S. 149 (1952) 14
United States v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958) 14
United States v. *Darnell*, 716 F.2d 479 (7th Cir.), cert. denied, 465 U.S. 1083 (1983) 17
United States v. *Kubrick*, 444 U.S. 111 (1979) 7, 15
United States v. *Mitchell*:
445 U.S. 535 (1980) 18, 20
463 U.S. 206 (1983) 18, 20
United States v. *Morgan*, 346 U.S. 502 (1954) 17
United States v. *Mottaz*, 476 U.S. 834 (1986) 7
United States v. *Pacific Railroad*, 120 U.S. 227 (1887) ... 14
United States v. *Russell*, 80 U.S. (13 Wall.) 623 (1871) ... 14
United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 21
United States v. *Testan*, 424 U.S. 392 (1976) 18
Urie v. *Thompson*, 337 U.S. 163 (1949) 15
Yasui v. *United States*, 772 F.2d 1496 (9th Cir. 1985) 16

Constitution, statutes, regulation and rule:

U.S. Const.:
Amend. I 19
Amend. IV 19
Amend. V:
Due Process Clause 19
Takings Clause 3, 5, 8, 13, 14, 16, 18, 19, 23
Amend. VIII 19
Amend. IX 19

Statutes, regulation and rule – Continued: Page

Act of Aug. 10, 1988, Pub. L. No. 100-383, 102 Stat. 903:
§ 1(1), 102 Stat. 903 22
§ 1(2), 102 Stat. 903 22
§ 1(4), 102 Stat. 903 22
§ 2(a), 102 Stat. 903-904 ..... 7, 22
§ 105(a)(5), 102 Stat. 906-907 22
§ 105(a)(6), 102 Stat. 907 22
Federal Tort Claims Act:
28 U.S.C. 1346(b) 2
28 U.S.C. 2401 17
28 U.S.C. 2401(a) 3
28 U.S.C. 2401(b) 2, 19
28 U.S.C. 2671 *et seq.* 2
28 U.S.C. 2675(a) 2
Indian General Allotment Act, 25 U.S.C. (& Supp. IV) 331 *et seq.* 20
25 U.S.C. 348 20
Japanese-American Evacuation Claims Act of 1948, ch. 814, 62 Stat. 1231 (50 U.S.C. App. (& Supp. III) 1981-1987) 14, 21
50 U.S.C. App. 1984(d) 22
Tucker Act:
28 U.S.C. 1346(a)(2) 2
28 U.S.C. 1491 ..... 2, 17
28 U.S.C. 1331 2
28 U.S.C. 2675(a) 18
Proclamation No. 4417, 41 Fed. Reg. 7741 (1976) 7
Fed. R. Civ. P. 12(b)(1) 2

Miscellaneous:

Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982) 3, 8, 10, 11, 14
M. Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (1949) 5, 15
H.R. Conf. Rep. 100-785, 100th Cong., 2d Sess. (1988) .. 22
H.R. Rep. 496, 82d Cong., 1st Sess. (1951) 21

Miscellaneous – Continued: Page

Harpers Magazine (Oct. 1942) 4

Rostow, *The Japanese American Cases – A Disaster*, 54 Yale L.J. 489 (1945) 9, 10, 14

J. tenBroek, E. Barnhart & F. Matson, *Prejudice, War and the Constitution* (1954) 9

Wash. Post, Aug. 4, 1988 22

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-215

WILLIAM HOHRI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 847 F.2d 779. The opinion of the district court (Pet. App. 18a-68a) is reported at 586 F. Supp. 769.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1988. The petition for a writ of certiorari was filed on August 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). (The petition also incorrectly cites 28 U.S.C. 1257(3).)

STATEMENT

1. Petitioners are an organization of Japanese-Americans and 19 citizens or resident aliens of Japanese ancestry who were involved in the Japanese evacuation program

during World War II. See generally *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). On March 16, 1983, petitioners filed this class action[1] against the United States, alleging 22 causes of action arising out of their evacuation and internment, including violations of various provisions of the Constitution (Counts I-XV), a claim for conspiracy to deprive plaintiffs of their civil rights (Count XVI), tort claims (Counts XVII-XX), and allegations of breach of contract and fiduciary duty (Counts XXI-XXII). Jurisdiction was alleged under 28 U.S.C. 1331, 1346(a)(2), and 1346(b) and other provisions.

On motion by the government to dismiss for lack of subject-matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), the district court dismissed the suit in its entirety. Pet. App. 19a-68a. The court held that sovereign immunity barred all of petitioners' claims except for those that could be pursued under either the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, or the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Pet. App. 39a-44a, 61a-65a.[2] The court held that petitioners' tort claims were barred by petitioners' failure to exhaust their administrative remedies as required by 28 U.S.C. 2675(a), and by the FTCA's two-year statute of limitations, 28 U.S.C. 2401(b). Pet. App.

---

[1] Petitioners requested certification of a class consisting of approximately 120,000 Japanese-Americans and resident Japanese aliens, or their descendants. The district court postponed ruling on the certification of the class until resolution of the government's motion to dismiss. Pet. App. 20a n.1.

[2] Petitioners limited their prayer for damages to $10,000 for each nontort cause of action for each class member (Pet. App. 128a), thereby bringing their Tucker Act claims within 28 U.S.C. 1346(a)(2), the "Little Tucker Act," which provides for concurrent jurisdiction in the United States Claims Court and in the district courts. See 28 U.S.C. 1491.

62a-63a. The court dismissed the breach-of-contract claim on the basis of the statute of limitations (Pet. App. 58a-60a), and the breach-of-fiduciary-duty claim on the ground that no fiduciary duty existed (Pet. App. 60a-61a).

With respect to petitioners' taking claims, the district court held that the claims stated a cause of action against the United States under the Tucker Act but were barred by the six-year statute of limitations, 28 U.S.C. 2401(a). Pet. App. 47a-58a. Petitioners had argued before the district court that the statute of limitations was tolled because the government had fraudulently concealed information that was essential to their Takings Clause claims. Petitioners did not allege that they had not known of their property losses, but rather that the government had concealed memoranda suggesting the absence of military necessity for the evacuation of Japanese-Americans on the West Coast, and that any suit brought under the Takings Clause after the war would have "foundered upon the government's defense that evacuation and internment were required by military necessity" (Pet. App. 49a). Petitioners argued that the concealed evidence was first revealed in a report released by the Commission on Wartime Relocation and Internment of Civilians (CWRIC), *Personal Justice Denied,* and that, accordingly, the statute of limitations did not begin to run until that report was released in 1983.

Specifically, petitioners alleged that documents written during the war called into question the military necessity for the evacuation. The first of these was a memorandum (86-510 J.A. 226-237)[3] prepared in January 1942 by Lt. Commander Kenneth Ringle of the Los Angeles Branch of the Office of Naval Intelligence, in which he offered his opinion that the "Japanese Problem" had been magnified

---

[3] "86-510 J.A." refers to the joint appendix filed in this Court in *United States* v. *Hohri,* No. 86-510 (June 1, 1987).

out of proportion, that 75% of Japanese-Americans were loyal and a majority of resident Japanese aliens "at least passively loyal to the United States," and that the "potentially dangerous element" (*id.* at 227-229) could be individually identified. Petitioners also referred to two memoranda written in 1944 by FCC Chairman James Fly and FBI Director J. Edgar Hoover (see *id.* at 238-243 (Fly); Pet. App. 33a (summarizing Hoover)), which questioned certain findings concerning shore-to-ship communications stated in a report of General John L. DeWitt, Commanding General of the Western Defense Command, to have occurred along the West Coast.[4]

The district court found that "the events surrounding the evacuation and internment have been subjected to intense scrutiny over the years and have produced a lengthy literature" and that the various memoranda submitted by

---

[4] Petitioners also pointed to documents that they claimed were disclosed for the first time in the CWRIC report. The district court discussed those documents and found that they were either irrelevant to petitioners' claims or corroborative of information already available. Pet. App. 53a-57a. Three of the documents were wartime Justice Department memoranda in which Edward Ennis, Director of the Department's Alien Enemy Control Unit, and attorney John Burling urged that the evidence questioning military necessity—notably, the substance of the Ringle report, which had been published in the October 1942 issue of *Harpers Magazine*—should be called to the Supreme Court's attention in the government's briefs in *Korematsu* and *Hirabayashi*. Pet. App. 131a-136a (Ennis); Pet. App. 137a-138a (Burling). The district court noted that the documents to which Ennis and Burling referred "became public and were available to diligent plaintiffs from the late 1940's onward," that "there has long been sufficient circumstantial evidence" that the Justice Department had the Ringle, Fly, and Hoover memoranda when it filed its brief in *Korematsu*, and that the concealment, whether intentional or not, "[was] not a basis for tolling a statute of limitations beyond the time the information concealed by that conduct was published" (Pet. App. 56a-57a).

petitioners had been published "at least as early as 1949" in Martin Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (1949). Pet. App. 51a, 52a & n.26. The district court concluded that, because "[t]hese publications lay out almost all of the facts alleged by [petitioners], along with many others," petitioners could not "claim that the facts underlying their suit were discovered by the Commission on Wartime Relocation and Internment of Civilians. * * * [A] suit could have been filed long ago" (Pet. App. 52a-53a).

2. Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit. A divided panel of that court held that it had appellate jurisdiction and then affirmed the dismissal of all of petitioners' claims except the Takings Clause claims. *Hohri* v. *United States,* 782 F.2d 227 (1986). As to the Takings Clause claims, however, the court held that the statute of limitations had been tolled until 1980, when, in the court's view, the government first confessed "*legal* error" (782 F.2d at 253 n.67).

Both the United States (No. 86-510) and the plaintiffs (No. 86-298) filed petitions for certiorari seeking review of the judgment of the court of appeals. This Court granted the government's petition and unanimously reversed the D.C. Circuit on jurisdictional grounds, ruling that the Federal Circuit had exclusive jurisdiction over the appeal. *United States* v. *Hohri,* No. 86-510 (June 1, 1987). The Court remanded the case with directions to transfer it to the Federal Circuit. The Court also granted the plaintiffs' petition and remanded the entire case "[b]ecause our resolution in No. 86-510 requires us to vacate the entire judgment of the Court of Appeals" (slip op. 3 n.2).

3. On remand, a divided panel of the Federal Circuit, in a per curiam opinion, affirmed the judgment in its entirety. The court held, "[a]fter a meticulous review" of

the district court's opinion, that "[e]ach of the numerous issues raised to this court [was] fully addressed in the opinion of Judge Oberdorfer"; the court was "unpersuaded of any error"; and there was "no need to restate or elaborate on the district court's careful and scholarly analysis" (Pet. App. 4a). Accordingly, the court "affirm[ed] for the reasons stated in the district court opinion" (*ibid.*).

Judge Baldwin dissented. He "agree[d] with much of what the trial judge sa[id]," but did not agree that petitioners' taking claims were barred by the statute of limitations (Pet. App. 5a). Instead, he would have held that *Korematsu* and *Hirabayashi* "*effectively* closed [the courts] * * * to evacuated and interned Japanese-Americans to challenge the validity of the exclusion orders" (Pet. App. 9a (emphasis in original)). While he acknowledged that "[petitioners] may have been on notice to inquire," and admitted that "[s]trict application of [the statute of limitations] * * * would yield the result reached by the trial court and majority," Judge Baldwin concluded that "it did not matter that [petitioners] knew of the existence of their injury and the identity of the defendant," because "any complaint filed by [petitioners] would have resulted in dismissal" (Pet. App. 10a, 12a (footnote omitted)). According to Judge Baldwin, the statute of limitations was tolled until passage in 1980 of the congressional Act creating the Commission on Wartime Relocation and Internment of Civilians, which constituted "the first intimation by any branch of the government that the Court's deference to the military was *legally* erroneous" (Pet. App. 14a (emphasis in original)).

ARGUMENT

Petitioners' claims are without merit. The decision below does not conflict with any decision of this Court or

another court of appeals. There is, accordingly, no warrant for further review.

1. We do not dispute that, as Congress has recently declared, "a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry" (Act of Aug. 10, 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903), and that, as President Ford proclaimed, the wartime measures out of which the case arose were "a setback to fundamental American principles" and involved "national mistakes" (Proclamation No. 4417, 41 Fed. Reg. 7741 (1976)). See also Pet. 13 n.10. Like all who have suffered wrongs, however, petitioners were obliged to pursue their claims diligently. The limitations period applicable to a suit against the United States " 'constitutes a condition on the waiver of sovereign immunity' " and, as such, "define[s] the extent of the court's jurisdiction" over a claim. *United States* v. *Mottaz,* 476 U.S. 834, 841 (1986) (quoting *Block* v. *North Dakota,* 461 U.S. 273, 287 (1983)); see also *United States* v. *Kubrick,* 444 U.S. 111, 117-118 (1979). Statutes of limitations "must be strictly observed" and may not be interpreted "in a manner that would 'extend the waiver [of sovereign immunity] beyond that which Congress intended' " (*Block* v. *North Dakota,* 461 U.S. at 287 (quoting *Kubrick,* 444 U.S. at 118)); see also *Soriano* v. *United States,* 352 U.S. 270, 276 (1957).

Petitioners assert (Pet. 13-17) that the statute of limitations on their taking claims (Count III) was tolled because the government misled this Court in *Korematsu* and *Hirabayashi* as to the lack of military necessity for the exclusion of Japanese-Americans. Petitioners further claim that they did not know of the government's "fraud" and, therefore, could not have reasonably brought suit until the 1980s, when certain documents were discovered and then released by the Commission on Wartime Relocation and Internment of Civilians. Pet. 17-22.

Petitioners are wrong for multiple reasons. Although the government had in its possession materials concerning the evacuation that it did not present to this Court while litigating *Hirabayashi* and *Korematsu,* those materials did not contradict the government's factual assertions before this Court. The government did not mislead this Court. Furthermore, nothing in this Court's decisions in *Hirabayashi* and *Korematsu* purported to address the "momentous questions not contained within the framework of the pleadings or the evidence" (*Korematsu,* 323 U.S. at 222) or otherwise suggested that a Takings Clause claim would have been futile. The losses of which petitioners now complain were completely known at the time. Nothing excuses petitioners' failure to bring such an action within six years of the alleged takings.

a. Petitioners argue that "not a single act of espionage or sabotage by Americans of Japanese ancestry in the United States was ever shown" (Pet. 11). The statement is true but devoid of the significance attributed to it by petitioners. As the CWRIC found, "[t]he Justice Department, defending the exclusion before the Supreme Court, made no claim that there was identifiable subversive activity" (*Personal Justice Denied* 50). We have previously explained in some detail (No. 86-510, Brief for the United States at 31-37; Reply Brief for the United States at 6-13) that the government did not mislead this Court while defending the evacuation in *Korematsu* and *Hirabayashi.*

In justifying the evacuation before this Court, the United States made a claim of "military necessity." In support of that claim, the United States did *not* argue that there was specific conduct by Japanese-Americans alleged to be indicative of past or planned subversive activity. Rather, the government looked to ancestral, cultural, and ethnic considerations, and then drew an inference about the likelihood of subversive activity. Brief for the United

States at 18-32, *Hirabayashi*; Brief for the United States at 11-12, 21-23, 26, 54-55 & n.28, *Korematsu*; see also J. ten-Broek, E. Barnhart & F. Matson, *Prejudice, War and the Constitution* 215-216, 265-266 (1954); Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 505-507 (1945). The government argued extensively that the Japanese people as a whole shared certain cultural, ethnic, and religious characteristics that made it "entirely possible that an unknown number of Japanese may lack to some extent a feeling of loyalty toward the United States." From this, the government concluded that, "[a]lthough it may be assumed that the majority of the Japanese residents on the West Coast were loyal to the United States, the very presence of the entire group presented grave danger because that group comprehended an unknown number of unidentified persons who constituted a serious threat," and that in order to deal effectively with the "unknown number of persons who could not readily be singled out," it was "necessary not only to deal with the entire group, but to deal with it at once" (Brief for the United States at 21, 34, 35, *Hirabayashi* (footnote omitted)). Whatever may have been wrong with those arguments was plain on the face of the arguments for the Court to see and evaluate; nothing in the government's arguments depended in the least on false factual assertions.

At the time of *Korematsu*, there was in public circulation a document—General DeWitt's *Final Report*—on which the government *could have* relied for certain questionable factual assertions, but the government did not rely on the *Final Report* in that regard. That document purported to find evidence of subversive activity by Japanese-Americans in certain unidentified shore-to-ship signaling on the West Coast, but the government had in its possession the Fly and Hoover memoranda, which called into question the assertions in the *Final Report* about signal-

ing. Therefore it would have been questionable to cite the *Final Report* on those points without disclosing the contradictory information. See Pet. App. 31a-38a. The United States, however, expressly disclaimed any reliance on the *Final Report* insofar as it went beyond the inferential arguments specifically set forth in the government's brief. See Brief for the United States at 11 n.2, *Korematsu*. This explicit dis-incorporation of the more colorful allegations of the *Final Report* was clearly understood at the time by the other litigants, the Court, and other observers. See, *e.g.*, Brief of the American Civil Liberties Union as Amicus Curiae at 21, *Korematsu* (describing the footnote as a "singular repudiation of General DeWitt's testimony on the military necessities"); see also *Personal Justice Denied* 88 ("in its brief to the Supreme Court the Justice Department was careful not to rely on DeWitt's *Final Report* as a factual basis for the military decision it had to defend") (footnote omitted); Rostow, *supra*, 54 Yale L.J. at 520.[5]

Although Department of Justice attorneys Ennis and Burling had urged a footnote that more specifically indicated why the government limited its reliance on the *Final Report* (Pet. App. 139a-143a), the footnote as written in the brief was not misleading.[6] Consistent with the govern-

---

[5] The colloquy from the *Korematsu* oral argument on which petitioners rely (Pet. 15) confirms, rather than undercuts, the proposition that the government carefully avoided reliance on the questionable factual assertions in the *Final Report*. Solicitor General Fahy responded to Chief Justice Stone's question by stating, "We stand on the proposition that there is sufficient [information], *from what is known as a matter of public knowledge, and which is not controverted,* to support the [military] judgment." Transcript of Oral Argument, *Korematsu*, at 10 (emphasis added).

[6] We note, in this regard, that the district court (whose opinion has now been adopted as that of the court of appeals) erred in suggesting

ment's disclaimer, the opinion of the Court in *Korematsu* cited the *Final Report* once (see 323 U.S. at 219 n.2), and there only for the correct proposition that "investigations made subsequent to the exclusion" showed that some evacuees "refused to swear unqualified allegiance to the United States" and that others "requested repatriation to Japan" (*id.* at 219 (footnote omitted)). Indeed, the only substantive discussion of the *Final Report* in *Korematsu* is found in the dissent by Justice Murphy, who extensively used the *Final Report* to argue that the evacuation was supported only by racist motives. See 323 U.S. at 235-239 (Murphy, J., dissenting).

This Court agreed in large measure with the government's arguments based on racial, ancestral, and cultural characteristics. The Court "stated in detail facts and circumstances * * * which support[ed] the judgment of the war-waging branches of the Government" that the evacuation was justified. The Court found that those facts and circumstances "afforded a rational basis for the decision which [was] made" (*Hirabayashi,* 320 U.S. at 101-102). According to the Court, the relevant circumstances were "facts of public notoriety" (*id.* at 102), including the events leading to the evacuation order (*id.* at 85-89), congressional findings (*id.* at 89-92), and the "social, economic and political conditions" that "in the particular war setting * * * set [Japanese-Americans] apart from others" (*id.* at 96, 101).[7] "[T]hose facts, and the inferences which could

---

that the Ennis and Burling memoranda "fully justify the condemnation of the wartime Department of Justice voiced by the Commission [on Wartime Relocation and Internment of Civilians] and the plaintiffs" (Pet. App. 55a). The report of the Commission, *Personal Justice Denied,* is sharply critical of the evacuation itself but contains not a word of criticism of the Department of Justice for the manner in which it litigated the wartime cases before this Court.

[7] In particular, the Court considered the "social, economic and political conditions" as "some of the many considerations which those

be rationally drawn from them," the Court concluded, provided "adequate support" for the government's actions (*id.* at 103, 105). Similarly, in *Korematsu,* the Court cited evidence that tended to "confirm[ ]" (323 U.S. at 219) "the assumptions upon which [it] rested [its] conclusions in the *Hirabayashi* case" (*id.* at 218). In short, the Court understood full well that the government's arguments were based on racial and social characteristics of Japanese-Americans rather than on claims of identifiable subversive activity, and the Court likewise based its judgment on the former and not the latter. The existence of a disavowed document containing questionable claims of identifiable subversive activity lends no support to petitioners' contention that the government defrauded this Court.[8]

b. Even assuming, arguendo, that the government committed improprieties that were somehow responsible for the results reached in *Hirabayashi* and *Korematsu,*

---

charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage" (*Hirabayashi,* 320 U.S. at 96, 98-99; see also *id.* at 90-91, 96-99, 101; *Korematsu,* 323 U.S. at 218-219).

[8] Thus, petitioners' assertion (Pet. 4) that the Ennis and Burling memoranda "show[ed] that responsible government officials at the time *actually knew* there was no factual justification to the claim of 'military necessity' and *knew* the exclusion and detention program was solely the product of racial animus" is not correct. Those documents show that the government knew that it had no basis for claiming that identifiable subversive activity, as opposed to general characteristics of Japanese-Americans, justified a claim of "military necessity." The government's statements to this Court were consistent with that knowledge. Only by falsely equating the government's claim of "military necessity" with a claim of identifiable subversive activity—a meaning that neither the government nor this Court assigned to that phrase at the time—can petitioners argue that the government acted duplicitously before this Court.

petitioners cannot rely on either decision to shield their inaction because neither decision foreclosed a suit for a taking of property. There is thus no basis for petitioners' claim that a timely civil suit based on the Takings Clause "would have foundered upon the government's defense that evacuation and internment were required by military necessity" (Pet. App. 49a). To the contrary, in both decisions the Court emphasized the narrowness of its ruling—which was limited, in *Hirabayashi,* to sustaining a "curfew order" (320 U.S. at 105), and in *Korematsu,* to upholding "temporary exclusion" of Japanese-Americans from a restricted area "as of the time [that the] order was made and when the petitioner violated it" (323 U.S. at 219).[9]

It is unlikely that the United States could have successfully asserted a defense of military necessity to petitioners' taking claims. Any argument that the takings were required by military necessity is severely undercut by the steps, though in many instances unsuccessful, that were taken to avoid destruction or appropriation of property. See No. 86-510, Brief for the United States at 39-40. In any event, the defense of "military necessity" is a narrowly tailored exception to the general rule that "a taking of private property * * * when the emergency of the public service in time of war * * * is too urgent to admit of delay

[9] In both cases the Court reserved the question whether "confinement" (*Hirabayashi,* 320 U.S. at 105), or "detention" (*Korematsu,* 323 U.S. at 222), was justified. In *Korematsu* the Court wrote, "we are dealing specifically with nothing but an exclusion order" and described as "momentous" and "serious" the questions it did not reach concerning the legality of assembly or relocation orders (*id.* at 222-223). Accordingly, the Court stated that it would "deal[ ] specifically with nothing but an exclusion order" (*id.* at 223). "It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied * * * and we have its terms before us" (*id.* at 222).

* * * creates an obligation on the part of the government to reimburse" (*United States* v. *Russell*, 80 U.S. (13 Wall.) 623, 629 (1871)). It has been limited almost exclusively to the "extraordinary situation" (*United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 182 (1958) (Harlan, J., dissenting)) where property is destroyed "by the operations of armies in the field" (*United States* v. *Pacific Railroad*, 120 U.S. 227, 239 (1887)), in order "to prevent the enemy from using it" (*United States* v. *Caltex, Inc.*, 344 U.S. 149, 153 (1952)). The "military necessity" precedents under the Takings Clause are inapposite to petitioners' claims. Although lower courts were obliged to follow the holding of *Korematsu*—that the *evacuation* was constitutional—nothing would have required them to capitulate to (non-existent) claims that military necessity justified the taking of property. And this Court, of course, had no obligation even to adhere to *Korematsu* if a timely attempt had been made to challenge it in the context of a Takings Clause claim.[10]

c. Even assuming, arguendo, that the statute of limitations was tolled on petitioners' takings claims, the courts below properly held that the tolling ended "long ago" (Pet.

---

[10] Moreover, we note that the property losses of which petitioners complain—those resulting from their exclusion and internment—were certainly known at the time. See Japanese-American Evacuation Claims Act of 1948, ch. 814, 62 Stat. 1231, codified as amended at 50 U.S.C. App. (& Supp. III) 1981-1987; *Personal Justice Denied* 118 (noting that more than 26,000 claims for aggregate payment of $148,000,000 were filed under the Act). Petitioners obviously do not, and cannot, claim that the government concealed their claims. Rather, what petitioners claim was concealed was evidence that would have undermined a *defense* that petitioners assumed the government would assert against those claims. Yet at least one prominent legal figure had suggested in 1945 that Japanese-Americans should seek "generous financial indemnity" for the "heavy property losses [suffered] as a consequence of their evacuation." Rostow, *supra*, 54 Yale L.J. at 533.

App. 55a, 57a). When a statute of limitations is tolled, the tolling does not last until whatever moment the plaintiff decides to bring suit. Rather, the tolling suspends the statute of limitations as against a plaintiff who is "blameless[ly] ignoran[t]" (*Urie* v. *Thompson*, 337 U.S. 163, 170 (1949)) of his claim until he is reasonably chargeable with notice of those facts that are required to plead a right of action. "Once [a] plaintiff is on inquiry that it has a potential claim, the statute can start to run" (*Japanese War Notes Claimants Association* v. *United States*, 373 F.2d 356, 359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967)), and the potential plaintiff must decide, within the period of the statute of limitations, "whether to sue or not." *United States* v. *Kubrick*, 444 U.S. 111, 124 (1979).

The evidence on which petitioners rely was available long before petitioners brought suit in 1983. If the statute of limitations was ever tolled—and, for the reasons explained above, it was not—the tolling ended with publication in the late 1940s of the Ringle, Fly, and Hoover documents that, as the district court found, were cited and discussed in M. Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (1949). See Pet. App. 51a-52a. Grodzins was followed in the 1950s, 1960s, and 1970s by several other books that discussed the three memoranda. See Pet. App. 52a n.26 (listing publications).[11]

---

[11] Nor can petitioners take comfort in the discovery in the 1980s of the Ennis and Burling memoranda. As the district court found, those memoranda reflect no more than "that some Justice Department officials believed that DeWitt's military necessity rationale was questionable" (Pet. App. 54a). At best, the memoranda present one side of a vigorous debate within the Department of Justice and between the Department of Justice and the War Department over the evacuation policy. Moreover, the memoranda only evidence *opinions* held by some attorneys on the inferences to be drawn from the Fly, Hoover, and Ringle memoranda; they do not contain additional *facts* that, if

Nor is there merit in petitioners' argument (Pet. 17-22) that there is a conflict between the decision below and the Ninth Circuit's decision in *Hirabayashi* v. *United States,* 828 F.2d 591 (1987). In *Hirabayashi,* the Ninth Circuit held that, in light of the discovery of the first draft of the *Final Report,* Gordon Hirabayashi had filed a timely petition for a writ of error coram nobis and was entitled to have his conviction vacated. The ruling of the court below, that petitioners' taking claims were barred by the statute of limitations, in no way conflicts with the Ninth Circuit's ruling that Hirabayashi's petition for coram nobis was not barred by laches. See Pet. App. 55a-56a & n.28.[12] See also *Yasui* v. *United States,* 772 F.2d 1496 (9th Cir. 1985). The filing of a timely suit under the Takings Clause is plainly not analogous to the filing of a timely petition for a writ of coram nobis. The former is a civil action and is governed

---

known, would have put petitioners on notice of their claims. Furthermore, as the district court found, "it is the Ringle, Fly, and Hoover documents, not the Ennis and Burling memoranda, which contain the direct evidence requisite to challenging the finding of military necessity. * * * The publication in the late 1940s of the previously concealed Ringle, Fly, and Hoover documents, not the publication in the 1980s of the Ennis and Burling memoranda, provided the basis on which plaintiffs could have filed a complaint challenging the military necessity finding and marked the beginning of the running of the statute of limitations" (Pet. App. 55a-56a).

[12] The district court distinguished this case from the coram nobis proceedings in *Korematsu* v. *United States,* 584 F. Supp. 1406 (N.D. Cal. 1984), on the ground that "this case involves the government's sovereign immunity, and thus requires a searching investigation of timeliness" (Pet. App. 55a-56a n.28). Although "the 'specific evidence' of [what the district court viewed as] governmental misconduct has only recently been revealed, circumstantial evidence has long been available" (*ibid.*). Moreover, "evidence of the government's misconduct was not requisite to the filing of [petitioners'] claims here; other evidence rebutting the government's claim of military necessity was available" (*ibid.*).

by a statute of limitations (28 U.S.C. 2401), whereas the latter is a post-conviction proceeding in equity subject to the doctrine of laches. See *United States* v. *Morgan*, 346 U.S. 502, 505 n.4, 511-513 (1954); *United States* v. *Darnell*, 716 F.2d 479, 480-481 (7th Cir.), cert. denied, 465 U.S. 1083 (1983).[13]

2. With respect to their remaining constitutional claims (Counts I-II, IV-XV), petitioners' principal argument is that this case is "*sui generis*" (Pet. 27) and that "a rigid application of sovereign immunity" would be "inappropriate" (Pet. 9, 22). Petitioners argue that, since the Tucker Act (28 U.S.C. 1491) waives sovereign immunity for claims "arising under the Constitution," they "should not need to show any further consent by Congress as a precondition" to their various constitutional claims (Pet. 23) and that the Court "need not be constrained to find an express statutory waiver of sovereign immunity" (Pet. 26). Petitioners' argument is completely without merit. As the Court has recently emphasized, "[a]s sovereign, the United States, in the absence of its consent, is immune from suit." *Library of Congress* v. *Shaw*, 478 U.S. 310, 315 (1986).

[13] There is, to be sure, a vast difference between our view of the historical record and that adopted by the Ninth Circuit in *Hirabayashi*. In particular, we cannot see how the government does anything wrong when it edits out of an official document statements that reflect the opinions of the document's drafter but do not reflect the opinions or policy of his superiors within the government, nor do we see how minor editorial changes to the *Final Report*—on which the government did not rely before this Court—could possibly have influenced this Court's judgment. Compare No. 86-510, Reply Brief for the United States at 9-13 & nn.14-15, with *Hirabayashi*, 828 F.2d at 599-604. There is, however, no need for this Court to grant certiorari in order to correct the historical record. There is no conflict between *Hirabayashi* and the decision below because of the entirely different procedures under which the two cases arose, and, in any event, there is little or no reasonable likelihood that the issue will arise again in either context. Thus, the usual reason for resolving conflicts among the circuits would be absent in this case even if there were a square conflict.

This Court has repeatedly affirmed that the Tucker Act "does not create any substantive right enforceable against the United States for money damages" (*United States* v. *Testan,* 424 U.S. 392, 398 (1976)). See also *United States* v. *Mitchell,* 463 U.S. 206, 216 (1983) (*Mitchell II*); *United States* v. *Mitchell,* 445 U.S. 535, 538 (1980) (*Mitchell I*). Rather, it is a limited waiver of sovereign immunity for substantive rights "found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department' " (*Mitchell II,* 463 U.S. at 216 (quoting 28 U.S.C. 1491)). See also *Army & Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 734 (1982). The "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*Testan,* 424 U.S. at 400, quoting *Eastport S.S. Corp.* v. *United States,* 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967)).

Petitioners do not and cannot allege that any constitutional provision under which they brought a claim—except the Takings Clause—can fairly be said to mandate the payment of damages by the United States.[14] Indeed, "[t]he

---

[14] Petitioners also contend that they "should not be barred from FTCA remedies for failure to file administrative claims pursuant to 28 U.S.C. § 2675(a)" (Pet. 24 n.13). That suggestion is not properly before this Court, as petitioners did not include it in their questions presented. Nor does it have any merit. Section 2675(a) makes plain that an action "shall not be instituted upon a claim against the United States for money damages * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." The courts have held that prior presentation is a "jurisdictional prerequisite to suit" (*Bruce* v. *United States,* 621 F.2d 914, 918 (8th Cir. 1980)) that "cannot be waived" (*Erxleben* v. *United States,* 668 F.2d 268, 271 (7th Cir. 1981)). See also *Odin* v. *United States,* 656 F.2d 798, 802 (D.C. Cir. 1981); *Schuler* v. *United States,* 628 F.2d 199, 201 (D.C. Cir. 1980) (en

courts have uniformly held that jurisdiction under the 'founded upon the constitution' grant of the Tucker Act is limited to claims under the 'takings clause' of the Fifth Amendment" (*Clark* v. *Library of Congress,* 750 F.2d 89, 103 n.31 (D.C. Cir. 1984)). Consequently, damage claims asserted against the United States under other provisions of the Constitution have consistently been rejected. See, *e.g., Clemente* v. *United States,* 766 F.2d 1358, 1363 (9th Cir. 1985) (claim brought under Fifth Amendment Due Process Clause), cert. denied, 474 U.S. 1101 (1986); *Radin* v. *United States,* 699 F.2d 681, 685 n.8 (4th Cir. 1983) (claim brought under Fifth Amendment Due Process Clause); *Jaffee* v. *United States,* 592 F.2d 712, 717-718 (3d Cir.) (claims brought under First, Fourth, Fifth, Eighth, and Ninth Amendments), cert. denied, 441 U.S. 961 (1979); *Duarte* v. *United States,* 532 F.2d 850, 851-852 (2d Cir. 1976) (claim brought under Fifth Amendment Due Process Clause); see also *Jaffee* v. *United States,* 663 F.2d 1226, 1230-1231 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982); *Jalil* v. *Campbell,* 590 F.2d 1120, 1123 (D.C. Cir. 1978) (per curiam).[15]

---

banc). Moreover, the district court correctly held (Pet. App. 62a-63a) that, in any event, petitioners' FTCA claims are barred by the FTCA's two-year statute of limitations (28 U.S.C. 2401(b)).

[15] Petitioners also claim, however, that constitutional rights become "vested property rights" (Pet. 25-26) for which they may demand compensation under the Takings Clause. Even if petitioners' novel vesting theory had merit (which it plainly does not), any claim to such a cause of action would still have to be brought under the Takings Clause and would have to have been filed within six years of the taking. Petitioners further argue that "[i]n the highly unusual facts of this case" the constitutional rights themselves may mandate compensation, and that, as a last resort, the judiciary has "inherent power" to protect constitutional rights and to create "all necessary remedies" (Pet. 23, 27). There is no precedent for petitioners' request, and, to the extent petitioners urge the Court to employ its equitable powers,

3. The district court correctly held that there is no evidence that the United States created a fiduciary relationship between the United States and the Japanese-Americans. Petitioners' reference (Pet. 28) to *Mitchell II* is unavailing. In *Mitchell II,* the Court held that there was a fiduciary relationship arising from the government's "elaborate" and "pervasive" statutory control over the resources of the Quinault Tribe (463 U.S. at 225 & n.29). The Court found that the statute gave the government "full responsibility to manage Indian resources and land for the benefit of the Indians" (*id.* at 224).[16] The Court's holding was "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people" (*id.* at 225).

There is no analogous relationship here. Certainly, the United States tried to assist the evacuees to provide for their property and wind up their affairs, and the government provided for the basic needs of those Japanese-Americans interned in the interior, but it stretches credulity to say that there was "a general trust relationship" between the United States and the internees for their benefit. But even assuming, arguendo, that a fiduciary relationship

---

"it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.' " *INS* v. *Pangilinan,* No. 86-1992 (June 17, 1988), slip op. 8 (quoting *Hedges* v. *Dixon County,* 150 U.S. 182, 192 (1893)).

[16] By contrast, in *Mitchell I,* the Court held that the Indian General Allotment Act, 25 U.S.C. (& Supp. IV) 331 *et seq.*, did not create a fiduciary duty despite the Act's language providing that the government was to "hold the land . . . in trust for the sole use and benefit" of the Quinault (445 U.S. at 541 (quoting 25 U.S.C. 348)). The Court found that the Act created only "a limited trust relationship" because it did not "unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands" (*id.* at 542).

was created in the 1940s, the fiduciary responsibilities of the United States would have ended long ago—by petitioners' calculation, in 1946 (Pet. App. 117a)—and the claims are barred by the statute of limitations. See *Mann* v. *United States,* 399 F.2d 672, 673 (9th Cir. 1968) (FTCA action filed by uneducated, minor Indian barred by statute of limitations; "[t]he fact that [plaintiff] is an Indian cannot * * * make a difference here"); see also *Smith* v. *United States,* 588 F.2d 1209, 1211 (8th Cir. 1978) (minority does not toll statute of limitations); *Casias* v. *United States,* 532 F.2d 1339, 1342 (10th Cir. 1976) (insanity does not toll statute of limitations under FTCA).

4. Finally, petitioners contend that this Court is the "last bastion for protecting the rights of minorities against abuses of government power," and that, under the "highly unusual facts of this case," the Court "should not leave the question of constitutional redress to the political process" (Pet. 13, 23). To the contrary, Congress is plainly the proper source of redress for "*sui generis*" cases. See, *e.g., United States* v. *Sioux Nation of Indians,* 448 U.S. 371 (1980).

Petitioners have not been, and are not now, without legislative redress in this case. In 1948 Congress, recognizing that "[t]he evacuation orders gave the persons affected desperately little time in which to settle their affairs," that the "safeguards that were designed to prevent undue loss * * * were never entirely successful," and that "the losses have been heavy" (H.R. Rep. 496, 82d Cong., 1st Sess. 1, 2 (1951) (letter from J.A. Krug, Secretary of the Interior, to Joseph W. Martin, Jr., Speaker of the House)), enacted the Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. App. (& Supp. III) 1981-1987, to redress property losses. Any petitioners or putative class members who received payments under that Act are barred from recovering here "with respect to all

claims arising out of the same subject matter" (50 U.S.C. App. 1984(d)). See Pet. App. 16a-17a (Baldwin, J., dissenting); 782 F.2d at 255-256.

More important, on August 10, 1988, the President signed into law Pub. L. No. 100-383, 102 Stat. 903. The Act provides that among the purposes for the legislation are to "acknowledge the fundamental injustice of the evacuation, relocation, and internment," to "apologize on behalf of the people of the United States," and to "make restitution to those individuals of Japanese ancestry who were interned." Pub. L. No. 100-383, § 1(1), (2), and (4), 102 Stat. 903. The Act adopts as a "Statement of the Congress" the finding that "a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians," and that these acts "were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." Pub. L. No. 100-383, § 2(a), 102 Stat. 903-904; see H.R. Conf. Rep. 100-785, 100th Cong., 2d Sess. (1988). Finally, the Act makes restitution of $20,000 to Japanese-Americans and resident alien Japanese interned during World War II,[17] an award

[17] Although Congress has offered petitioners the reparations they sought through this suit, the Act does not necessarily moot this case. The Act would moot the claims of those petitioners who elect to accept the reparations offered by Congress. The acceptance of payment is "in full satisfaction of all claims against the United States arising out of the [evacuation and internment]" (§ 105(a)(5), 102 Stat. 906-907). However, petitioners could only accept any reparations in this case by waiving their right to reparations under the Act: "[n]o payment may be made * * * to any individual who * * * accepts payment pursuant to an award of a final judgment or a settlement on a claim against the United States" (§ 105(a)(6), 102 Stat. 907). At least one putative class member has publicly declared her intention to decline the reparations because "I want the Supreme Court to look at this" (Wash. Post, Aug. 4, 1988, at C1, C14).

double that which could be recovered in this suit under the Takings Clause.[18]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
BARBARA L. HERWIG
JAY S. BYBEE
Attorneys

OCTOBER 1988

---

[18] Petitioners waived damages in excess of $10,000 for any claim in order to bring suit in district court. See note 2, *supra*; Pet. App. 128a.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60689